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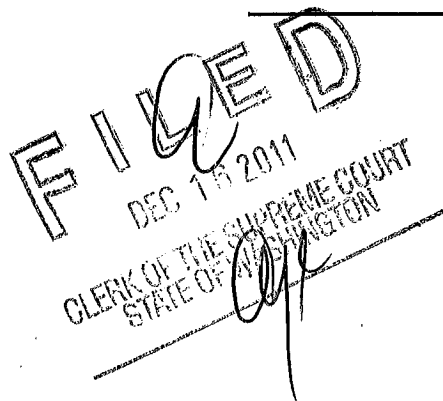
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Supreme Court No. 86359-8  
Court of Appeals No. 65367-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM ADAM GRAY,

Petitioner.

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ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

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SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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#### A. SUMMARY OF APPEAL

Following William Gray's conviction for manslaughter, the trial court ordered him to pay restitution to the Crime Victims Compensation Program for an amount the program paid on behalf of the victim's family for funeral expenses. The order was timely, having been entered within 180 days of sentencing. More than 180 days after sentencing, however, the State moved to modify the restitution order, requesting payment to the victim's family for additional funeral expenses. The court granted the motion.

The trial court's decision to enter the new restitution award, and the Court of Appeals' decision to affirm, are contrary to the provisions and central purpose of the Sentencing Reform Act (SRA), and the weight of authority from Washington courts. In a fundamental shift from previous practice, the SRA requires trial courts to impose sentences with exactitude and authorizes modifications in only narrow circumstances. Although the statute permits courts to modify the amount of restitution, it does not state explicitly the circumstances under which such modifications are allowed. In keeping with the central purpose of the SRA, Washington courts generally allow modifications of restitution only where there is a change of circumstances, to address factors that

did not exist at the time of sentencing. The trial court's modification order contravenes these principles and should be vacated.

**B. ISSUE PRESENTED**

Whether the SRA authorizes the trial court to enter a second restitution award, beyond the statutory 180-day time limit, to cover expenses that existed at the time of sentencing?

**C. STATEMENT OF THE CASE**

In May 2009, William Gray pled guilty to manslaughter after recklessly shooting Sanelive Hikila in the chest during a fight outside a bar in Renton. CP 3, 6-27. The incident occurred on November 5, 2006. CP 3.

The guilty plea agreement provided Mr. Gray "shall pay restitution in full to the victim(s) on charged counts." CP 23.

At sentencing on June 5, 2009, the State requested restitution, with the amount to be determined on a future date. 6/05/09RP 3. Two months later, on August 12, the court ordered Mr. Gray to pay \$6,730.82 in restitution to the Crime Victims

Compensation Program.<sup>1</sup> CP 37. The order covered the amount the Crime Victims Compensation Program had paid to Sanelive Hikila's family for burial expenses. CP 37, 63-69.

More than eight months later, on April 30, 2010, the State filed a motion requesting a "modification" of the restitution order. CP 41-44. A hearing was held May 4. The prosecutor explained Sanelive Hikila's family was now requesting restitution for additional funeral expenses that had not been reimbursed by the Crime Victims Compensation Program. 5/04/10RP 2; CP 55-59. The prosecutor's office had sent a letter to the Hikilas soon after sentencing, inquiring whether they were seeking restitution, but the family never responded. 5/04/10RP 3; CP 42. Subsequently, in early April 2010, Hikila's mother, Salome, finally telephoned the prosecutor's office inquiring about restitution. 5/04/10RP 3; CP 42. She said she never received the letter sent by the prosecutor's office in June 2009. She said the family had incurred funeral

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<sup>1</sup> The Crime Victims Compensation Program is authorized by the Crime Victims Compensation Act, chapter 7.68 RCW, and administered by the Department of Labor and Industries. The program reimburses victims and their families for certain expenses, including funeral expenses, incurred as a result of violent crime. See <http://www.lni.wa.gov/ClaimsIns/CrimeVictims/About> (last visited Dec. 14, 2011).

expenses of \$15,253.32 in addition to the amount reimbursed by the Crime Victim's Compensation Program. 5/04/10RP 3-4; CP 42. The prosecutor asked the court to "modify" the original restitution award to cover the additional expenses. 5/04/10RP 4. The court granted the motion, over defense objection that the motion was untimely. CP 38-46.

Mr. Gray appealed and the Court of Appeals affirmed, concluding the second restitution order was proper in light of this Court's decision in State v. Gonzalez, 168 Wn.2d 256, 226 P.3d 131 (2010). State v. Gray, No. 65367-9-I, 2011 WL 2184261, at \*2-3 (June 6, 2011).

#### D. ARGUMENT

THE SECOND RESTITUTION AWARD  
CONTRAVENES THE PROVISIONS AND CENTRAL  
PURPOSE OF THE SRA, AS WELL AS THE CASE  
LAW INTERPRETING IT, BECAUSE IT COVERS  
EXPENSES THAT EXISTED AT THE TIME OF  
SENTENCING

The SRA provides: "The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's



jurisdiction." RCW 9.94A.753(4).<sup>2</sup> An offender remains under the court's jurisdiction "until the obligation is completely satisfied, regardless of the statutory maximum for the crime." Id.

Although the statute provides the amount of a restitution award may be modified at any time as long as the court maintains jurisdiction, it does not say restitution may be modified *for any reason*. The central purpose and underlying principles of the SRA suggest the Legislature intended to grant courts authority to modify the amount of a restitution award only to address factors that did not exist at the time of the initial award. Washington case law applying the modification provision is almost uniformly in accord with this interpretation. Thus, the trial court's order modifying the restitution award to cover expenses that existed at the time of sentencing is contrary to legislative intent.

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<sup>2</sup> This provision has been part of the SRA since soon after it was enacted. See Former RCW 9.94A.140(1) (1983). Originally, the court's jurisdiction to modify a restitution award extended for 10 years. Id.

1. The central purpose and underlying principles of the SRA suggest the Legislature intended to grant courts authority to modify the amount of a restitution award only to address factors that did not exist at the time of sentencing. A court's authority to order restitution is derived solely from statute. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010).

It is well-settled that the meaning of the statutory provision must be discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. See Christensen v. Ellsworth, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007) (citing Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002)). The Court's ultimate objective is to give effect to the Legislature's intent. Christensen, 162 Wn.2d at 372-73 (citing Campbell & Gwinn, 146 Wn.2d at 9).

Thus, when attempting to discern the meaning of a provision of the SRA, the Court "must take into account the language in the context of the greater statutory scheme governing sentencing procedures." State v. Mendoza, 165 Wn.2d 913, 924, 205 P.3d 113 (2009). After doing so, if the statute is amenable to more than one reasonable interpretation, it is ambiguous. Id. at 921. The

ambiguity must be resolved in the defendant's favor. Id. at 925 n.5; State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

This Court reviews questions of statutory interpretation de novo. Burns v. City of Seattle, 161 Wn.2d 129, 140, 164 P.3d 475 (2007).

The central purpose of the SRA is to establish a sentencing scheme that requires judges "to fix all the terms and conditions of a sentence, with exactitude, at the time sentence is imposed." David Boerner, Sentencing in Washington, at 1-3 (1985); see also id. at 4-1. The sentencing scheme is based on a just deserts philosophy rather than a rehabilitation model,

"under which sentences are to be based primarily on considerations of the seriousness of the crime of conviction and the prior criminal history. *Since these factors can be known at the time of sentencing, there is no need to grant the power to modify the terms of sentences at some later date.*"

State v. Shove, 113 Wn.2d 83, 86, 776 P.2d 132 (1989) (quoting Boerner, Sentencing in Washington, supra, at 4-1) (emphasis in Shove). This limitation on a judge's ability to modify a sentence is a fundamental change from prior practice that "is central to the 'reform' in the Sentencing Reform Act." Boerner, Sentencing in Washington, supra, at 4-1.

Thus, "[t]he SRA permits modification of sentences only in specific, carefully delineated circumstances." Shove, 113 Wn.2d at 86 (citing Boerner, Sentencing in Washington, *supra*, at 4-1 n.6). Modifications are allowed "only in those limited circumstances where the interests of justice most urgently require." Shove, 113 Wn.2d at 88. Such exceptions apply where the Legislature perceived a need for them, that is, where the relevant factors *could not* be known at the time of sentencing. See Boerner, Sentencing in Washington, *supra*, at 4-1 n.6. For example, the SRA specifically allows the term of a sentence to be reduced if an offender has earned early release time for good behavior. RCW 9.94A.729(1)(a). The SRA also specifically authorizes courts to impose up to 60 days confinement if an offender violates a condition of community custody. RCW 9.94A.633(1)(a). As for restitution, the SRA specifically authorizes courts to reset an offender's monthly minimum payments "if there has been a change in circumstances that warrants an amendment of the monthly payment schedule." RCW 9.94A.753(2).

But "[m]odification of a judgment is not appropriate merely because it appears, wholly in retrospect, that a different decision might have been preferable." Shove, 113 Wn.2d at 88. Under the

Court of Appeals' reading of the statute in this case, a sentencing court could modify the amount of a restitution award even years after sentencing, to cover expenses existing at the time of the initial award, simply because the State failed to gather all of the necessary evidence in a timely manner. That is an absurd and strained result that is contrary to the central purpose and underlying principles of the SRA. It is not what the Legislature must have intended. See Davis v. Dep't of Licensing, 137 Wn.2d 957, 970-71, 977 P.2d 554 (1999) ("[T]he rule of statutory construction that trumps every other rule" is that the Court should not adopt an interpretation that results in absurd or strained consequences).

2. Where the State seeks restitution to cover factors that existed at the time of sentencing, the State must gather all of the necessary evidence within 180 days. RCW 9.94A.753(1) provides: "When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days." The implications of the Court of Appeals holding in this case is that the State need not gather all of the necessary evidence to support a restitution award within 180 days, as long as it presents enough evidence to support an initial, partial award within that time frame. According to the Court of Appeals, once an

initial award is entered, the State may move to modify it at any time based on newly collected evidence, no matter how dilatory it was in gathering that evidence. That outcome is inconsistent with the strict manner in which Washington courts have applied the statutory time limit and the fundamental principle of finality on which it rests.

It is well-settled that the statutory 180-day time limit is mandatory unless extended by the court for good cause.<sup>3</sup> State v. Moen, 129 Wn.2d 535, 542-43, 919 P.2d 69 (1996); State v. Krall, 125 Wn.2d 146, 148-49, 881 P.2d 1040 (1994); State v. Tetreault, 99 Wn. App. 435, 437, 998 P.2d 330 (2000). If the defendant objects to the amount of restitution, the court must hold a hearing and accurately determine the amount within 180 days. State v. Ryan, 78 Wn. App. 758, 761-63, 899 P.2d 8245 (1995). Although a court may modify the amount of restitution for as long as the court retains jurisdiction over the offender, RCW 9.94A.753(1), "the trial court's ability to modify an order of restitution does not impact its

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<sup>3</sup> Even where the defendant agrees to pay restitution as part of a plea agreement, the actual amount must be set within 180 days or the restitution order is void. State v. Hunsicker, 129 Wn.2d 554, 559-62, 919 P.2d 79 (1996); State v. Duback, 77 Wn. App. 330, 332-33, 891 P.2d 40 (1995). Therefore, Mr. Gray's agreement to pay restitution as part of his guilty plea did not relieve the State of its obligation to prove the amount of restitution within 180 days.

initial obligation to accurately determine the amount within" 180 days of sentencing. Id. at 763; see also Moen, 129 Wn.2d at 541 (citing Ryan with approval and vacating restitution order entered beyond statutory time limit).

If the State cannot gather all of the necessary evidence within 180 days of sentencing, it must show "good cause" for extending the deadline. Tetreault, 99 Wn. App. at 438; State v. Johnson, 96 Wn. App. 813, 817, 981 P.2d 25 (1999); State v. Duvall, 86 Wn. App. 871, 875, 940 P.2d 671 (1997). In determining whether "good cause" exists, the court must consider the State's diligence in procuring the necessary evidence as well as other factors such as the length of the delay, the reason for the delay, the defendant's assertion of his or her right to speedy sentencing, and the extent of prejudice to the defendant. Tetreault, 99 Wn. App. at 438; Duvall, 86 Wn. App. at 875. Courts may extend the 180-day deadline only sparingly and not for a "garden variety claim of excusable neglect." Duvall, 86 Wn. App. at 875.

In addition, if the State wishes to extend the deadline, it must make a motion within the 180 days. Tetreault, 99 Wn. App. at 438; Johnson, 96 Wn. App. at 816-17.

In Moen, this Court made clear that the interest in finality secured by the mandatory time limit takes precedence over victims' rights to restitution. 129 Wn.2d at 542 ("[o]ur unanimous holding in Krall recognizes that the statutory time mandate prevails over victims' rights to restitution."). The Court explained,

It is inappropriate to hold a defendant accountable by imposing restitution in violation of former RCW 9.94A.142 [now RCW 9.94A.753(1)] in order to 'enforce' victims' rights, as the State urges us to do, when the State failed in its burden to comply with the statutory 60-day [now 180-day] time requirement.

Id.

"The principle that time limits exist which may bar compensation to injured persons is not a novel concept in our jurisprudence. At some point, rights will be cut off." Id. Although barring restitution when the order is entered too late means the victim will not receive compensation, this Court held that result is acceptable when the State's delay precludes compliance with the mandatory time limit. Id. For one thing, "compensation is not the primary purpose of restitution, and the criminal process should not be used as a means to enforce civil claims." Id. (quoting State v. Martinez, 78 Wn. App. 870, 881, 899 P.2d 1302 (1995)). At the same time, it is generally in the victim's best interest to have



restitution set in a timely fashion, when evidence of loss is fresh and the victim's need is often at its greatest. Moen, 129 Wn.2d at 543. Thus, it is "imperative that the State obtain a timely restitution order both to serve the victim's interest and to comply with the Legislature's mandate that the amount of restitution be determined" within 180 days of sentencing. Id.

The need for finality, and the State's obligation to gather evidence with diligence, do not end once a court enters an initial restitution order. Even though the court may modify the amount of restitution for as long as it retains jurisdiction over the offender, its authority to modify does not impact its initial obligation to determine the amount accurately within 180 days of sentencing. See Ryan, 78 Wn. App. at 763. The Court of Appeals holding in this case is contrary to these principles and to the strict manner in which Washington courts have applied the statutory time deadline.

3. Case law supports the view that courts may modify the amount of a restitution award only if there has been a change of circumstances. Consistent with the underlying principles of the SRA and the fundamental interest in finality, Washington courts, in most cases, have permitted modifications to restitution awards only

where there has been a change of circumstances, unless the modification at issue was expressly authorized by statute.<sup>4</sup>

In Gonzalez, this Court permitted the modification of a restitution award to cover a victim's ongoing medical expenses resulting from a crime, even though the modified order was entered more than 180 days after sentencing. 168 Wn.2d at 266. The Court explained:

If no amendment were available after 180 days, the victim would be limited to restitution for only the first six months of treatment after sentence. Disallowing amendments after 180 days would fundamentally undermine the purpose of the restitution statute where the victim is burdened with an ongoing serious injury.

Id.

In State v. Goodrich, 47 Wn. App. 114, 116-17, 733 P.2d 1000 (1987), the Court of Appeals concurred that the primary purpose of the statute allowing modification of the amount of restitution is to provide a remedy to victims who incur ongoing expenses. Although a court may not award restitution for future, projected medical expenses, if the victim does incur additional

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<sup>4</sup> Of course, regardless of whether there has been a change of circumstances, courts have authority "to amend a judgment to correct an erroneous sentence, where justice requires." State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996) (and authorities cited).

expenses, he or she may file a motion for modification at that time.

Id. The modification provision

states an intent by the Legislature to allow a court to increase a defendant's obligation to make restitution when a victim incurs further costs. While this imposes a burden on the victim and the court to hold an additional hearing, it also enables the court to order restitution for the "actual medical expenses incurred."

Id. at 117.

Other changes in circumstances may support the modification of a restitution award. For example, in State v. Edelman, 97 Wn. App. 161, 163, 984 P.2d 421 (1999), Edelman was ordered to pay restitution on a monthly payment plan but the victim died before she finished paying. The Court of Appeals held that, under those circumstances, the trial court was authorized to modify the restitution order to change the designated payee. Id. at 167-68. Such a modification is permissible because it "does not change the nature of the defendant's obligation." Id. at 168.

In other cases, the Court of Appeals has disallowed restitution modifications where there has been no change in circumstances. In State v. Burns, 159 Wn. App. 74, 81, 244 P.3d 988 (2010), for instance, Burns pled guilty to several crimes and entered an agreement with the State establishing the amount of

restitution for those crimes. Id. at 74. He also agreed to pay restitution for certain uncharged crimes but disputed the amount.<sup>5</sup> Id. At sentencing, the trial court ordered restitution only for the charged crimes. Id. at 77. More than 180 days later, the court granted the State's motion to impose additional restitution for the uncharged crimes. Id. The Court of Appeals reversed, explaining, "[u]nlike Gonzalez, this is not a case where additional damages flowing from the crime continued to accumulate after the original restitution order was entered. In this case, *the State does not contend that the amount of additional restitution was undeterminable within the 180-day period following Burns' sentencing.*" Id. at 81 (emphasis added).

In other cases, the Court of Appeals has allowed modifications to restitution awards without a change of circumstances only where the type of modification was specifically authorized by the SRA. In In re Personal Restraint of Martin, for instance, the trial court ordered Martin to pay restitution "[o]n a

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<sup>5</sup> A trial court may order restitution for uncharged crimes "if the offender pleads guilty to a lesser offense or fewer offenses and agrees with the prosecutor's recommendation that the offender be required to pay restitution to a victim of an offense or offenses which are not prosecuted pursuant to a plea agreement." RCW 9.94A.753(5).

schedule established by the defendant's Community Corrections Officer." 129 Wn. App. 135, 137, 118 P.3d 387 (2005). But while Martin was still incarcerated, and before he had a community corrections officer or a payment schedule, the Department of Corrections began seizing money from his inmate accounts to pay his legal financial obligations. *Id.* at 138. The Court of Appeals affirmed the modification only because those circumstances were specifically addressed by the SRA. RCW 9.94A.772 specifically provides that "[n]otwithstanding . . . monthly payment or starting dates set by the court," legal financial obligations "may be immediately collected by civil means."<sup>6</sup> The statute "changes the Sentencing Reform Act to specifically allow for collection of legal financial obligations during incarceration despite language in a defendant's judgment and sentence that would direct otherwise."

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<sup>6</sup> RCW 9.94A.772, provides:

Notwithstanding any other provision of state law, monthly payment or starting dates set by the court, the county clerk, or the department before or after October 1, 2003, shall not be construed as a limitation on the due date or amount of legal financial obligations, which may be immediately collected by civil means and shall not be construed as a limitation for purposes of credit reporting. Monthly payments and commencement dates are to be construed to be applicable solely as a limitation upon the deprivation of an offender's liberty for nonpayment.

Martin, 129 Wn. App. at 140. If not for the statute, however, the court would probably have granted Martin's petition. Id. at 138.

Similarly, in State v. Reed, the court entered a timely restitution order to cover funeral expenses. 103 Wn. App. 261, 263, 12 P.3d 151 (2000). More than 180 days later, the court ordered additional restitution to reimburse the Crime Victims Compensation Program for payments made to the surviving spouse. Id. at 264. The Court of Appeals affirmed the modification only because former RCW 9.94A.142(4) specifically authorized restitution for reimbursement of fund benefits within one year rather than 180 days.<sup>7</sup> Id. at 266. If not for the statute, however, "the State would be foreclosed in its argument." Id. at 266 n.9.

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<sup>7</sup> The statute, now RCW 9.94A.753(7), provides:

Regardless of the provisions of subsections (1) through (6) of this section, the court shall order restitution in all cases where the victim is entitled to benefits under the crime victims' compensation act, chapter 7.68 RCW. If the court does not order restitution and the victim of the crime has been determined to be entitled to benefits under the crime victims' compensation act, the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order. Upon receipt of a petition from the department of labor and industries, the court shall hold a restitution hearing and shall enter a restitution order.

The only published Washington case that Mr. Gray is aware of that is potentially at odds with these principles is State v. Halsey, 140 Wn. App. 313, 165 P.3d 409 (2007). In that case, a timely restitution order was entered. More than 180 days later, the State moved to amend the order to cover the costs of the victim's counseling, claiming that at the time of the first restitution order, it did not have an amount for the cost of counseling. Id. at 319. With little discussion, the Court of Appeals affirmed. Id. at 327. Because the Court of Appeals did not analyze the question in light of the statutory scheme as a whole or the fundamental need for finality, Halsey should not change the result in this case.

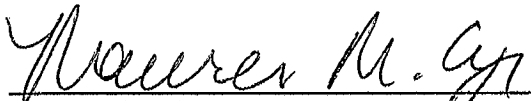
4. The second restitution award must be vacated. Here, the initial restitution award, set within the 180-day time period, was for \$6,730.82, payable to the Crime Victim's Compensation Fund for amounts distributed by the fund to the victim's family for funeral expenses. CP 37, 42. About eight months later, the victim's family contacted the prosecutor requesting reimbursement for additional funeral expenses—expenses that were incurred at the same time as the initial funeral expenses. CP 42. Although members of the victim's family were present at sentencing, the prosecutor did not establish at that time whether the family would be seeking

restitution for funeral expenses. 6/05/09RP 2, 4-6; CP 39. The prosecutor sent a letter to the family in June 2009 inquiring about restitution but did not follow up to make sure the family had received the letter. The funeral expenses were incurred long before the sentencing hearing. The State *could have* proved those expenses at the time of the initial restitution award. The State did not offer a sufficient basis for the untimely request other than "excusable neglect." See Duvall, 88 Wn. App. at 875. Therefore, the modified restitution award is void. State v. Lewis, 57 Wn. App. 921, 924, 791 P.2d 250 (1990) (order imposing restitution is void if statutory provisions are not followed).

E. CONCLUSION

Because the court exceeded its authority in entering the second restitution order, it must be vacated.

Respectfully submitted this 16th day of December, 2011.

  
MAUREEN M. CYR (WSBA 28724)  
Washington Appellate Project - 91052  
Attorneys for Petitioner



**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**


STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 86359-8
v.	)	
	)	
WILLIAM GRAY,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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JAMES WHISMAN, DPA	( )	HAND DELIVERY
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APPELLATE UNIT		
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SEATTLE, WA 98104		
[X] WILLIAM GRAY	(X)	U.S. MAIL
859322	( )	HAND DELIVERY
STAFFORD CREEK CORRECTIONS CENTER	( )	_____
191 CONSTANTINE WAY		
ABERDEEN, WA 98520		

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF DECEMBER, 2011.

X \_\_\_\_\_ 

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**To:** 'Maria Riley'  
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**Subject:** RE: 863598-GRAY-SUPPLEMENTAL BRIEF

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**From:** Maria Riley [<mailto:maria@washapp.org>]  
**Sent:** Friday, December 16, 2011 3:32 PM  
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**Cc:** [kristin.relyea@kingcounty.gov](mailto:kristin.relyea@kingcounty.gov); [Jim.Whisman@kingcounty.gov](mailto:Jim.Whisman@kingcounty.gov)  
**Subject:** 863598-GRAY-SUPPLEMENTAL BRIEF

**State v. William Gray**  
**No. 86359-8**

Please accept the attached documents for filing in the above-subject case:

### **SUPPLEMENTAL BRIEF OF PETITIONER**

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